Supreme Court, U.S.
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No. 91-1382

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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THE SHUBERT ORGANIZATION, INC., et al.,
*Petitioners,*

*-against-*

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,
*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

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## RESPONDENT SAVE THE THEATRES' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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April 27, 1992

## COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below properly reject an as-applied takings challenge to theatre landmark designations, where the landmark designations substantially advanced New York City's legitimate interest in historic preservation, did not deny the theatre owners economically viable use of their property, and where the theatre owners failed to pursue available administrative remedies to establish and relieve alleged economic hardship?

2. Should this Court reconsider its decision in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), which is consistent with the Court's subsequent Takings Clause decisions, in a factual context in which such reconsideration is unnecessary?

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . v

STATEMENT OF THE CASE . . . . . 1

Introduction . . . . . 1

The 1982 Demolitions . . . . . 2

The 1982 Public Hearings . . . . . 3

The Hardy Report . . . . . 4

The Theatre Interior Guidelines . . . . . 4

The 1988 Designations . . . . . 6

Petitioners' Failure to Seek Available Administrative Hardship Relief . . . . . 7

Petitioners' Litigation Challenge . . . . . 8

REASONS FOR DENYING THE WRIT . . . . . 10

SUMMARY OF ARGUMENT. . . . . 10

POINT ONE

THE NEW YORK APPELLATE DIVISION PROPERLY REJECTED PETITIONERS' AS-APPLIED TAKINGS CHALLENGE BECAUSE THE THEATRE LANDMARK DESIGNATIONS SUBSTANTIALLY ADVANCE NEW YORK CITY'S HISTORIC PRESERVATION GOALS AND DO NOT DENY PETITIONERS ECONOMICALLY VIABLE USE OF THEIR THEATRES . . . . . 11

A. The Theatre Landmark Designations Satisfy The Well Settled Standard Applicable To Regulatory Takings Challenges . . . . . 11

1. The Theatre Landmark Designations Substantially Advance New York City's Legitimate Interest In Historic Preservation. . . . . .13

2. The Theatre Landmark Designations Do Not Deny Petitioners Economically Viable Use Of Their Property . . . . . 15

B. Petitioners' As-Applied Takings Challenge Is Unripe Because Petitioners Have Not Sought Administrative Relief . . . . . 18

C. The Fact That No Evidentiary Hearing Was Held Is Irrelevant To Petitioners' Takings Claim . . . . . 20

POINT TWO

THIS CASE DOES NOT PROVIDE AN APPROPRIATE OCCASION FOR THE COURT TO REVIEW ITS DECISION IN PENN CENTRAL . . . . . 23

A. This Case Does Not Require Reconsideration of Penn Central Or Provide An Appropriate Setting For Such Reconsideration . . . . . 23

B. Petitioners Offer No Convincing Rationale For Reconsidering Or Overruling Penn Central. . . . . 24

CONCLUSION . . . . . 29

# TABLE OF AUTHORITIES

## CASES

Agins v. Tiburon, 447 U.S. 255 . . . . . 12, 16, 24

Bowen v. Gilliard, 483 U.S. 587 (1987) . . . . . 12, 15, 24

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) . . . . . 22

Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) . . . . . .12, 21, 24

Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) . . . . . .22

Hodel v. Irving, 481 U.S. 704 (1987) . . . . . 24

Hodel v. Virginia Surface Min. & Reclam. Ass'n, 452 U.S. 264 (1981) . . . . . 18, 20, 23, 24

Kaiser Aetna v. United States, 444 U.S. 164 (1979) . . . . . 24

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 468 (1987) . . . . . 12, 24, 25, 26

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) . . . . . 12, 24

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) . . . . . .24

New Orleans v. Dukes, 427 U.S. 297 (1976). . . . . .27

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) . . . . . .12, 13, 15

Penn Central Transp. Co. v. City of New York, 438 U.S 104 (1978) . . . . . .1, 8, 12, 13, 16, 17, 20, 26, 27

Pennell v. City of San Jose, 485 U.S. 1 (1988). . . . . 27, 28

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) . . . . . 25

Pension Benefit Guaranty Corp. v. LTV Corp., ___ U.S. ___, 110 S. Ct. 2668 (1990) . . . . . .22

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) . . . . . 24

Saint Bartholomew's Church v. City of New York, 914 F.2d 348 (1990) . . . . . 15

United States v. Causby, 328 U.S. 256 (1946) . . . . . 12

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) . . . . . 24

Williamson County Regional Planning Comm'n. v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) . . . . . .18, 19, 20, 22, 24

Yee v. City of Escondido, 60 U.S.L.W. 4301 (Apr. 1, 1992) . . . . . 18

## STATUTES

New York City Zoning Resolution §§ 81-746 . . . . . .17

New York City Zoning Resolution §§ 81-747 . . . . . .17

N.Y.C. Admin. Code § 25-301 et seq. . . . . .passim

N.Y.C. Admin. Code § 25-302(n), (m) . . . . . .4, 22

N.Y.C. Admin. Code § 25-306 . . . . . .7

N.Y.C. Admin. Code § 25-307 . . . . . .5, 7

N.Y.C. Admin. Code § 25-308 . . . . . .5

N.Y.C. Admin. Code § 25-309 . . . . . .7, 18, 22

## RULES

Sup. Ct. R. 10.1(b) . . . . . 10

Sup. Ct. R. 10.1(c) . . . . . .10

Fed. R. Civ. P. 56 . . . . . 21

N.Y. Civ. Prac. Law § 3212 (McKinney 1991) . . . . . 21

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## STATEMENT OF THE CASE

### Introduction

Respondent Save the Theatres, Inc. ("Save the Theatres") respectfully urges the Court to deny the writ of certiorari sought by The Shubert Organization, Inc., et al. ("Petitioners") to review the May 16, 1991 decision and order of the New York Supreme Court, Appellate Division, First Judicial Department, which affirmed the dismissal of Petitioners' complaint. Petitioners seek nullification of New York City's designation as landmarks of twenty-two historic Broadway theatres. Save the Theatres is a nonprofit organization of actors, directors, choreographers, designers, and writers who create Broadway theatre. It was formed in

1982 to educate the public concerning the architectural and cultural importance of historic theatres.[1]

The 1982 Demolitions

In 1982, the Broadway theatre community was shaken by the demolition of five theatres, including the Helen Hayes and Morosco, two historic and successful theatres that formed an important part of Broadway's theatre heritage and that were eligible for inclusion on the National Register of Historic Places. A 2.[2] The theatres were destroyed to pave the way for construction of the Marriott Marquis Hotel project, sponsored by New York City, the stated purpose of which was to contribute to the revitalization of the Broadway theatre district.

The Marriott Marquis Hotel project was funded in part by an Urban Development Action Grant through the United States Department of Housing and Urban Development. That agency conditioned ultimate permission to demolish the theatres on mitigating measures that included a building-by-building review of each of the remaining historic Broadway theatres to determine if any was eligible for local or national designation as a landmark. A 2.

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1. Save the Theatres was granted leave to intervene as a party respondent by the trial court. JA 2970. Save the Theatres is a not-for-profit corporation under the laws of the State of New York. It has no parent companies or subsidiaries.

2. References to the Appendix to this Brief in Opposition to The Petition for a Writ of Certiorari are cited as "A _." References to the Appendix to the Petition are cited as "PA _." References to the Joint Appendix in the Supreme Court, Appellate Division, First Judicial Department of the State of New York are cited as "JA _." References to the full Record on Appeal before the Supreme Court, Appellate Division, First Judicial Department of the State of New York are cited as "RA __."

The 1982 Public Hearings

New York City's Landmarks Preservation Commission (the "Landmarks Commission") held public hearings on proposed designations of various Broadway theatres on June 14-15, 1982.[3] Testimony from architects in support of the designations informed the Landmarks Commission of the technology of theatre design, including acoustics, sightlines, audience/stage relationships and decorative schemes, and explained the relationship between the excellence of these elements found in the Broadway houses and the success of the Broadway theatre experience. Save the Theatres detailed the production histories and architectural features that made each theatre important. Historians, critics, and theatre professionals placed the theatres within the context of the development of American musical and dramatic theatre, and described how the future of these art forms depended on the existence of these singular spaces. A 7.[4]

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3. Forty-five theatres were calendared for consideration, 38 for both exterior and interior designations and seven for interior designation only. A 7.

4. See Affidavit of the late actress Colleen Dewhurst: "The acoustics in the old Broadway houses, the sight lines, their configurations and decor, enable the actor immediately and intimately to make contact with the audience. That is the crucial element in our art. The old Broadway houses were built with deep, implicit respect for the importance of that principle: contact among people." A 30. See also Affidavit of set designer Ming Cho Lee: "The designated Broadway theatres are unique in the world. Elements of their interior design and ornamentation were crafted by hand; we have lost the art of building theatres that way. Interior features give the theatre its human scale, which in turn permits the intimate communication vital to live

(continued...)

On October 19, 1982 the designation hearings continued. The affected New York City Community Board supported approximately three-quarters of the proposed designations, and documented its recommendations with specific, detailed research. A 8.

The Hardy Report

On April 22, 1983, Petitioners themselves submitted to the Landmarks Commission a report prepared by their architectural consultant Hugh Hardy (the "Hardy Report"). R 1839-2065. Over 200 pages long, the Hardy Report concluded that "taken as a whole these 30 buildings [owned by Petitioners] are economically culturally and physically irreplaceable." A 40. Mr. Hardy rated every one of the 30 theatres he studied within the "A" (highest) range with regard to the five factors that he considered relevant for consideration by the Commission. See A 40-41.[5]

The Theatre Interior Guidelines

During the Landmarks Commission's consideration of the proposed designations, Petitioners raised the concern that interior designations could restrict the creative freedom

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4.(...continued)
theatre. . . . It is that essential sympathy, established within the physical world of the theatre interior, that provides the opportunity for connection between audience and performer, and between our present and our past." A 25-26.

5. In designating a landmark, the Landmarks Commission is empowered to consider the "special historical or aesthetic interest or value [of a building, including its interior] as part of the development, heritage or cultural characteristics of the city, state or nation. . . ." N.Y.C. Admin. Code §§ 25-302(m), (n); PA 48a. N.Y.C. Admin. Code §§ 25-301 et seq. is referred to herein as the "Landmarks Law."

of set designers and producers to create a special mood for a play or musical. Petitioners contended that review of proposed changes to a theatre auditorium under the Landmarks Commission's Certificate of Appropriateness procedures would delay and increase the cost of productions. A 10; see also N.Y.C. Admin. Code §§ 25-307, 308; PA 59a-61a.

After meeting with a committee of set and lighting designers, the Landmarks Commission drafted guidelines (the "Interior Guidelines") to address Petitioners' stated concern. The Interior Guidelines provided that any reversible production related change to a designated interior could be carried out without review by the Landmarks Commission, so long as the Commission was informed by letter that changes were taking place and that the theatre would be returned to a similar state when the show closed. A 11-12.

For example, the highly successful production of "Phantom of the Opera" required front-of-house changes that were carried out smoothly under the Interior Guidelines in a theatre then calendared for landmarking. JA 2913-14.

The Interior Guidelines further provided that state of the art technical changes required by a production could be installed freely and could be carried over to an unlimited number of subsequent productions with simple notification to the Landmarks Commission. JA 5573-74.[6]

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6. In his affidavit testimony, Ming Cho Lee expressed his professional view that the Interior Guidelines "are both reasonable and essential, and will not prevent or impede in any way the mounting of productions on Broadway." A 20. Mr. Lee addressed in detail the reasonableness of and necessity for the guidelines, with regard to both production related and permanent changes to theatre interiors. A 21-25.

On December 10, 1985, the Landmarks Commission held a public hearing to discuss the proposed Interior Guidelines. R 2917-3008. At the hearing, the head of Petitioner Shubert Organization testified as follows:

> I would really like to express my appreciation to the Commissioner and the staff for the time that they have spent with us in developing these guidelines. I think that the time has been productively spent. R 2924.

After a process that included extensive consultation with experts and with Petitioners, the Landmarks Commission adopted the Interior Guidelines.[7]

The 1988 Designations

While the numerous and voluminous designation reports on theatre interiors and exteriors were being prepared, the Landmarks Commission began an exhaustive series of 29 Executive Sessions to consider the proposed theatre designations. JA 2929-31. Petitioners or their representatives attended critical Executive Sessions of the Commission, see R 2481, and met on other occasions with Landmarks Commissioners and staff, see R 2473. The Commission held intensive, long sessions during the months preceding its final vote in January 1988. These sessions included staff presentations, slides, and personal visits to the theatres. JA 2930. After these rigorous deliberations, the Landmarks Commission determined that of 75 theatre

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7. Petitioners now argue, for the first time, that the Interior Guidelines are "unauthorized by law." Petition at 4 n.5. They provide no authority for the novel proposition that the Landmarks Commission lacks power to issue guidelines designed to expedite and streamline the temporary, reversible alteration of interior landmarks.

interiors and exteriors proposed for designation, 26 interiors and 21 exteriors satisfied the applicable statutory criteria.[8] A 15.

On March 10, 1988, the Board of Estimate heard further testimony from the public, see JA 1125-1292, including extensive testimony from Petitioners, see A 1129-67. After closely questioning the Landmarks Commission Chairman, and long hours of consideration, the Board of Estimate approved the designations that had been recommended by the Landmarks Commission. JA 1312-48; A 15-16.

Petitioners' Failure To Seek Available Administrative Hardship Relief

Following the landmark designations of the theatres at issue, Petitioners did not avail themselves of the Landmarks Law's administrative hardship procedure through which, on an appropriate specific showing, restrictions on a designated property can be eased or eliminated if the landmark owner is denied reasonable economic value as a result of landmark designation. See N.Y.C. Admin. Code § 25-309; PA 62a-70a. To date, Petitioners have failed to seek administrative hardship relief with regard to any of the theatres whose designation they challenge.[9]

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8. For reasons not relevant here, eight designation decisions were made before the rest.

9. The Landmarks Law also provides two administrative procedures that allow certain alterations of a landmark under appropriate circumstances. See N.Y.C. Admin. Code §§ 25-306, 307; PA 58a-59a. Petitioners have failed to point to a single instance where they have been denied permission to alter their theatres under these procedures.

Petitioners' Litigation Challenge

Petitioners sought judicial review of the landmark designations in New York Supreme Court, New York County, alleging a host of statutory and constitutional grounds for invalidation. Petitioners moved for summary judgment and Respondents cross-moved for summary judgment. PA 13a. At oral argument on the motions for summary judgment, Petitioners requested an evidentiary hearing to inquire into the "single narrow issue" whether the New York City Board of Estimate followed routine procedure with regard to its consideration of the theatre designations. A 47; see also PA 5a. The trial court ruled that supplementation of the record through submission of affidavits on this issue was sufficient. JA 219. On December 5, 1989, the trial court granted Respondents' cross-motion to dismiss. PA 9a-42a.

On May 16, 1991, the New York Supreme Court, Appellate Division, First Judicial Department, unanimously rejected Petitioners' appeal from the trial court's judgment. PA 1a-8a. With regard to Petitioners' facial constitutional takings challenge to the Landmarks Law, the First Department found that the challenge was resolved by this Court's decision in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) ("Penn Central"). PA 6a-7a. With respect to Petitioners' as-applied constitutional takings challenge, the First Department held as follows:

> [T]he scheme of law embodied in the Landmarks Act serves a legitimate purpose of saving historical landmarks. With respect to any claim that petitioners are deprived of any economic use of their property, in the absence of final agency action on applications by petitioners for renovations or alterations, the matter is not ripe for review. In

> the meantime, there is no prohibition against petitioners receiving economic benefit from continuing the use of the buildings as theatres. In any event, transferable development rights inure to the owners of these buildings, which, absent a successful challenge, must be presumed to have economic benefit. We note that some of petitioners, in fact, have made use of these transferable development rights. PA 7a (citations omitted).

On September 19, 1991, the New York Court of Appeals dismissed Petitioners' appeal from the First Department's decision, purportedly taken as of right, on the grounds that "no substantial constitutional question is directly involved." 78 N.Y.2d 1006, 580 N.E.2d 1059, 575 N.Y.S.2d 456 (1991). On December 18, 1991, the New York Court of Appeals denied Petitioners' motion for leave to appeal. 78 N.Y.2d 751, 587 N.E.2d 289, 579 N.Y.S.2d 651 (1991). On February 26, 1992, Petitioners applied to this Court for a writ of certiorari.

## REASONS FOR DENYING THE WRIT

## SUMMARY OF ARGUMENT

Petitioners have demonstrated no basis for granting certiorari in this fact-specific land use regulation case. The voluminous administrative record demonstrates that the theatres at issue were properly designated as landmarks based on their historical, architectural, and cultural qualities. The conclusion that the designations do not violate constitutional principles has been endorsed, without a single judge dissenting, by both the trial court and the New York Appellate Division, First Judicial Department. The New York Court of Appeals has twice determined that Petitioners' constitutional arguments are not worthy of further judicial review.

Petitioners have not alleged a conflict with a decision of another state court of last resort or with a United States Court of Appeals. See Sup. Ct. R. 10.1(b). Petitioners have failed to demonstrate that the New York Appellate Division's decision conflicts in any way with the applicable decisions of this Court. See Sup. Ct. R. 10.1(c).

Petitioners' as-applied takings challenge to the theatre landmarks designations must fail. The theatre designations further the important governmental goal of preserving New York City's historic and cultural heritage. Petitioners have failed to demonstrate that the theatre designations have caused any diminution in the value of their property. Moreover, Petitioners' unsupported claims of economic hardship are unripe because they have failed to avail themselves of the Landmarks Law's administrative hardship relief procedure.

This Court should reject Petitioners' invitation to reconsider the Penn Central decision. Petitioners concede

that such reconsideration is unnecessary in this action. Moreover, the Penn Central decision is consistent with the Court's subsequent Takings Clause decisions. Petitioners' other constitutional claims are without merit because the Landmarks Law is rationally related to a legitimate state purpose.

## POINT ONE

## THE NEW YORK APPELLATE DIVISION PROPERLY REJECTED PETITIONERS' AS-APPLIED TAKINGS CHALLENGE BECAUSE THE THEATRE LANDMARK DESIGNATIONS SUBSTANTIALLY ADVANCE NEW YORK CITY'S HISTORIC PRESERVATION GOALS AND DO NOT DENY PETITIONERS ECONOMICALLY VIABLE USE OF THEIR THEATRES.

Petitioners improperly urge this Court to grant certiorari to review the basic and undisputed propositions that this Court's decision in Penn Central (a) does not preclude an as-applied Takings Clause challenge to particular landmark designations and (b) requires consideration of the factors enunciated in Penn Central and subsequent Takings Clause cases. Petition at i (Questions Presented for Review). The New York Appellate Division's ruling comports with both of these well settled principles of constitutional law and requires no further review.

### A. The Theatre Landmark Designations Satisfy The Well Settled Standard Applicable To Regulatory Takings Challenges.

This Court has:

> long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an

> owner economically viable use of his land," Agins v. Tiburon, 447 U.S. 255, 260 (1980).

Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987). See also Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 468, 485 (1987); Penn Central, 438 U.S. at 124-127. The Court has identified several factors that have particular relevance in determining whether a taking has occurred: (a) the economic impact of the regulation on the claimant; (b) the extent to which the regulation has interfered with distinct investment-backed expectations; and (c) the character of the government action. See Bowen v. Gilliard, 483 U.S. 587, 606 (1987); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25 (1986); Penn Central, 438 U.S. at 124.[10]

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10. Here, the government character factor clearly weighs in favor of a finding that the theatre landmark designations did not effect a taking, and Petitioners do not argue to the contrary. As this Court has held:

> It is well settled that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g., United States v. Causby, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the public good." Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). While the Court has almost invariably found that the permanent physical occupation of property constitutes a taking, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-438 (1982), the Court has repeatedly upheld regulations that destroy or adversely affect real property interests. [citations omitted].

Keystone, 480 U.S. at 488 n.18. The landmark designations at issue are a form of land use regulation, not a physical appropriation of Petitioners' property.

Petitioners aver that the Appellate Division ruled "in a one-sentence discussion" that their as-applied takings challenge was barred by this Court's decision in Penn Central and that the Appellate Division improperly applied a "bright-line" test. Petition at 7, 8. Petitioners' assertion is incorrect. In fact, the Appellate Division properly considered the relevant factors and concluded that Petitioners had "not carried their burden of demonstrating that the Landmarks Law as applied to these particular theatres" effected a taking. PA 7a.[11]

1. The Theatre Landmark Designations Substantially Advance New York City's Legitimate Interest In Historic Preservation.

Petitioners fail to satisfy the first prong of the Nollan test because the theatre landmark designations substantially advance New York City's legitimate interest in historic preservation. This Court "has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city. . . ." Penn Central, 438 U.S. at 129. More recently, in Nollan, this Court specifically listed landmarking as a land use regulation that is within the "broad range of governmental purposes and regulations" that satisfies the "legitimate interest" and "substantially advances" requirements. 483 U.S. at 834.

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11. The relative brevity of the Appellate Division's discussion of the takings claim (which was at any rate considerably more extensive than a "single sentence discussion") may be attributed to the fact that the central issue raised by Petitioners in the Appellate Division involved due process. The Appellate Division rejected that claim as meritless, PA 5a-6a, and Petitioners do not pursue it before this Court.

The theatre landmark designations at issue here were based on a voluminous record, including the testimony of scores of theatre professionals and interested members of the public. The record demonstrates the designated theatres to be irreplaceable architectural, historical, and cultural gems that fit snugly within the Landmarks Law criteria.[12] It is

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12. While Petitioners allege freely that their theatres were unworthy of landmark protection and that the designations were improperly motivated, see, e.g., Petition at 5 n.7 and 9 n.10, they utterly failed to substantiate these allegations at every level of the state court proceedings. See PA 24a (Trial court notes that "[p]etitioners' rather conclusory assertions that respondents' actions were, inter alia, 'ill conceived', 'shortsighted', 'drastic and illegal', 'plainly unauthorized', and 'onerous' are in sharp contrast with the contents of record.") The one citation to the administrative record that Petitioners have mustered in support of their theory, Petition at 9 n.10, a remark by a Landmarks Commissioner that "[f]rom an architectural point of view the theaters are no great shakes," is egregiously out of context. In fact, that Landmarks Commissioner then went on to state:

> We are here to -- we have to recognize that theaters are part of the history of New York and also that their physical quality makes them part of the history of New York.
>
> Their physical quality that draws people to them, that causes people to act well in them and to be heard and to be responded to and to be either acclaimed or panned by the critics the next day.
>
> This is all part of the culture. So where does one draw the line? A 48.

Far from showing discriminatory intent or improper motive, the full quotation evidences a full and accurate regard for the criteria set forth in the Landmarks Law. The Commission's struggle to draw an appropriate line was the exercise of informed, rational

(continued...)

simply beyond dispute that the theatre landmark designations substantially further an important governmental goal, as both the New York Appellate Division, PA 7a, and the trial court, PA 41a, properly concluded.[13]

2. The Theatre Landmark Designations Do Not Deny Petitioners Economically Viable Use Of Their Property.

Petitioners have not approached, much less satisfied, the second prong of the Nollan test because they have failed to prove that the theatre landmark designations deny them economically viable use of their land, see Nollan, 483 U.S. at 834, whether measured in terms of the economic impact of the designations on Petitioners or by the extent to which the designations have interfered with Petitioners' distinct investment-backed expectations, see Bowen, 483 U.S. at 606.

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12.(...continued)
decisionmaking.

13. Petitioners argue that the trial court's failure to hold an evidentiary hearing "precluded evaluation" of whether the designations fulfilled the first prong of the Nollan test. Petition at 5 n.7. This contorted argument is based on the mistaken and wholly unsubstantiated premise that interior landmarks burden theatre productions. See p. 5 n.6 above and pp. 16-17 below. Moreover, after this Court's statements in Penn Central and Nollan, there is no logical or legal basis for the assertion that the landmark designation of historic buildings does not substantially advance historic preservation goals. See Saint Bartholomew's Church v. City of New York, 914 F.2d 348, 357 n. 6 (1990) (Challenged landmark designation substantially advances a legitimate state interest because, "[w]hile land use restrictions must be reviewed in the context of the individual property in question, the same governmental interest held to be valid in Penn Central -- 'preserving structures and areas with special historic, architectural or cultural significance,' (citations omitted) is equally applicable here."), cert. denied, 111 S.Ct. 1103 (1991).

First, there is no concrete evidence of record that Petitioners have actually suffered any diminution in the value of their theatres due to the landmark designations. The theatre owners merely postulate that the interior landmark designations will interfere with their ability to mount productions. They have produced no evidence that any of the designated theatres has suffered any losses in revenue due to the interior designations. Their failure to do so is not surprising because the special Interior Guidelines developed by the Landmarks Commission, with input from a range of theatre professionals, ensure that production-related changes to theatre interiors can be made easily and efficiently, so long as the changes are reversible and meet other reasonable criteria. See pp. 4-6 above; A 11-13, 21-25.

Second, Petitioners have produced no evidence to demonstrate that the landmark designations have interfered with their distinct investment-backed expectations. The landmark designations clearly allow Petitioners to continue to use their properties as theatres, which must be considered to be Petitioners' most reasonable investment-backed expectation. See Penn Central, 438 U.S. at 136 (landmark designation of Grand Central Terminal "does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel" because it "not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years . . . ."). See also Agins, 447 U.S. at 262 (rejecting takings challenge where "[a]lthough the [zoning] ordinances limit development, they neither prevent the best use of appellants' land, nor extinguish a fundamental attribute of

ownership")(citations omitted). The New York Appellate Division properly so found. PA 7a.[14]

Third, as this Court has held, under the Landmarks Law and the New York City Zoning Resolution, "[a]lthough the designation of a landmark and landmark site restricts the owner's control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect": the provision of additional opportunities to transfer development rights that are not accorded to non-landmark buildings. Penn Central, 438 U.S. at 113-14. The significance of development rights is heightened here because several provisions of New York City's Zoning Resolution confer upon landmarked theatres a broader ability to transfer development rights (the air rights above their theatres) than is granted to either nonlandmarked theatres or to other landmarks that are not theatres. See, e.g., New York City Zoning Resolution §§ 81-746, 81-747; see also JA 2901-06. Economic benefit associated with the right to transfer development rights is a relevant factor in considering the economic impact of a challenged land use regulation. Penn Central, 438 U.S. at 137. Here, while Petitioners contended that their ability to transfer development rights is limited, the courts below found that some of the landmarked theatres owned by Petitioners have already made use of these transferable development rights. PA 7a. See also JA 2901-06.

Finally, although the Landmarks Law offers a hardship procedure through which restrictions on a designated

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14. Moreover, nothing in the Landmarks Law prohibits Petitioners from using the theatre buildings for profitable nontheatre uses. For instance, the Landmarks Commission has approved an application to make temporary alterations to a landmarked theatre that will allow the interior of the theatre to be used as a marketing center. JA 2898.

property can be eased or eliminated based on an appropriate showing that the designation denies the owner reasonable economic value, N.Y.C. Admin. Code § 25-309, PA 62a-70a, none of Petitioners has initiated this procedure for any of the theatres whose designation is challenged in this action. In addition to supporting a finding that Petitioners' as-applied challenge is unripe for review, see pp. 18-20 below, the failure to seek available administrative relief undercuts Petitioners' claim that the landmark designations have denied them economically viable use of their property.

B. Petitioners' As-Applied Takings Challenge Is Unripe Because Petitioners Have Not Sought Administrative Relief.

This Court has repeatedly held that an as-applied takings challenge is not ripe for review until the landowner obtains a final determination concerning the application of the challenged regulation to his property and has sought and been denied administrative relief. See, e.g., Williamson County Regional Planning Comm'n. v. Hamilton Bank of Johnson City, 473 U.S. 172, 186-88 (1985)(as-applied takings challenge to zoning ordinance unripe because owner had not sought and been denied variance); Hodel v. Virginia Surface Min. & Reclam. Ass'n, 452 U.S. 264, 297 (1981)(as-applied takings challenge to Surface Mining Act unripe because mine owners had not sought and been denied variances or waivers); see also Yee v. City of Escondido, 60 U.S.L.W. 4301, 4305 (Apr. 1, 1992)(as-applied takings challenge to mobile home rent control ordinance would not be ripe because owners had not sought rent increases)(dicta). Here, the New York Appellate Division correctly determined that Petitioners' as-applied takings challenge was not ripe for

review "in the absence of final agency action on applications by petitioners" for hardship relief. PA 7a.[15]

This Court explained in Williamson that its:

> reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. These factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

473 U.S. at 190-91 (citations omitted). In Williamson, the Court rejected as unripe a property owner's as-applied takings challenge to a zoning board's denial of permission to develop a subdivision because the owner had failed to seek zoning variances, which left "open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances." Id. at 193-94. Thus, the zoning board's "denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property." Id. at 194.

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15. As is discussed above at pp. 13-18, the Appellate Division considered the relevant factors to a takings determination despite its finding that the as-applied challenge was unripe. PA 6a-7a.

Similarly, in this action the theatre owners have failed to seek the administrative hardship relief available under the Landmarks Law, leaving open the possibility that such relief, if sought, would be granted. Thus, landmark designation itself cannot be said to "conclusively determine" whether Petitioners "will be denied all reasonable beneficial use" of their property. Williamson, 473 U.S. at 194. If Petitioners "were to seek administrative relief under [the available hardship] procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating the need to address the constitutional questions." Hodel, 452 U.S. at 297.[16]

C. The Fact That No Evidentiary Hearing Was Held Is Irrelevant To Petitioners' Takings Claim.

Petitioners suggest that the fact that the trial court declined to hold an evidentiary hearing nullifies the court's finding that the theatre landmark designations did not effect a taking. Petition at 4-5, 9-10. This argument makes no sense as a matter of fact or law.

First, Petitioners' assertion that the trial court should have held an evidentiary hearing on the economic impact of the landmark designations rings false because Petitioners never requested an evidentiary hearing to present evidence

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16. Petitioners criticize the Appellate Division's finding that the as-applied challenge was unripe, arguing that Penn Central questioned the right of appellants there "to challenge the consequences of designation, as they had not challenged the act of designation when it was made." Petition at 6 n.8. This argument misreads Penn Central. The Penn Central Court merely noted that appellants' facial claim that the landmark designation process was inevitably arbitrary had a "particularly hollow ring" because appellants had never challenged the Grand Central Terminal designation itself as arbitrary. Penn Central, 438 U.S. at 132.

on their Fifth Amendment Takings Clause claims. Petitioners moved for summary judgment on all their claims. PA 13a. During initial oral arguments on the summary judgment cross-motions before the trial court, Petitioners' counsel requested an evidentiary hearing on "the single narrow issue" concerning the procedural method by which the Board of Estimate approved the landmark designations, an issue which Petitioners at that time asserted implicated due process concerns. A 47. The court, upon consideration, determined that this issue should be addressed by amplifying the record through the submission of additional affidavits rather than through an evidentiary hearing. JA 219.

Second, there is no constitutional requirement that an as-applied takings challenge trigger an evidentiary hearing as a matter of law. The "ad hoc, factual inquiries" raised by an as-applied takings challenge, Connolly, 475 U.S. at 224, call for consideration of the factors described above at pp. 11-12. If, however, the record reveals no disputed issue of material fact, summary judgment can and must be granted. Fed. R. Civ. P. 56; N.Y. Civ. Prac. Law § 3212 (McKinney 1991). Here, where Petitioners failed to produce any concrete evidence with regard to either prong of the Nollan standard, and where their as-applied challenge was in fact unripe, summary judgment was appropriately granted.

Finally, it should be noted that Petitioners are arguing, in effect, that the trial court should have held the economic hardship hearing that they themselves failed to seek before the Landmarks Commission under the hardship relief provisions of the Landmarks Law. This attempt to bypass

administrative procedures is improper.[17] Rather, judicial review is only appropriate to consider the agency's final decision based on a full agency factfinding record. See Williamson, 473 U.S. at 186-93.[18]

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17. Petitioners' argument that the trial court should have held an evidentiary hearing on economic impact because the Landmarks Commission did not consider economic impact in designating the theatres is similarly flawed. Under the Landmarks Law, the criteria for landmark designation do not include economic impact. See N.Y.C. Admin. Code § 25-302(n), PA 48a. Economic impact will be considered under the Landmarks Law after designation, if the owner of a designated landmark seeks hardship relief. See N.Y.C. Admin. Code § 25-309, PA 62a-70a. Petitioners cannot properly complain that the landmark designation process did not consider economic impact, when such consideration is precluded by law, and when Petitioners themselves have not sought the hardship relief that is afforded by the Landmarks Law.

18. Petitioners' citations to Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), Pension Benefit Guaranty Corp. v. LTV Corp., __ U.S. __, 110 S. Ct. 2668 (1990), and Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985), are without avail. The latter two cases explain that when a reviewing court cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. See Pension Benefit Guaranty Corp., __ U.S. at ___, 110 S. Ct. at 2680; Florida Power & Light Co., 470 U.S. at 744. As the Court explained in Pension Benefit Guaranty Corp., Overton Park stands for the proposition that, under the Administrative Procedure Act, an agency must take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision. __ U.S. at __, 110 S. Ct. at 2680. Here, however, a remand to the Landmarks Commission would serve no purpose because Petitioners have not initiated the hardship proceedings before the Commission that might lead to the necessary factfinding.

## POINT TWO

## THIS CASE DOES NOT PROVIDE AN APPROPRIATE OCCASION FOR THE COURT TO REVIEW ITS DECISION IN PENN CENTRAL.

While asserting that "no aspect of Penn Central need be called into question" for them to prevail if the Court grants certiorari, Petitioners invite the Court to reconsider its decision in Penn Central or, even more broadly, "the constitutional and logical pinnings of landmark designations in general." Petition at 10. Respondent respectfully urges the Court to decline this open-ended invitation, first, because this case neither requires nor provides an appropriate factual setting for the Court to review its holding in Penn Central, and second, because Penn Central is consistent with the Court's subsequent Takings Clause decisions.

### A. This Case Does Not Require Reconsideration of Penn Central Or Provide An Appropriate Setting For Such Reconsideration.

It is well settled that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." Hodel, 452 U.S. at 294-95. Here, as Petitioners themselves concede, review of the Court's decision in Penn Central would not be required to determine the merits of Petitioners' claims should a writ of certiorari be granted. The facts of this case, in particular Petitioners' failure to seek hardship relief under the Landmarks Law, which precludes a final determination of the economic impact of the designations on Petitioners, militates against reconsideration of Penn Central. Reconsideration of Penn Central in this context would be especially inappropriate given the breadth of Petitioners' arguments, which may call into question not only the constitutionality of all municipal landmarks statutes, but also,

through the request that this Court determine whether a comprehensive plan is a constitutional requirement for land use regulation, the constitutionality of numerous municipal zoning regulations.

B. Petitioners Offer No Convincing Rationale For Reconsidering Or Overruling Penn Central.

Petitioners offer no reasoned basis for reconsidering or overruling Penn Central. The holding and reasoning in Penn Central have been cited in numerous subsequent Takings Clause decisions by this Court, indicating the Court's continued adherence to its principles and conclusions. See, e.g., Bowen, 483 U.S. at 607; Hodel v. Irving, 481 U.S. 704, 713-14 (1987); Keystone, 480 U.S. at 485; MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 350 (1986); Connolly, 475 U.S. at 224; Williamson, 473 U.S. at 187; Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425-26 (1982); Hodel, 452 U.S. at 296; Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980); Agins, 447 U.S. at 260; Kaiser Aetna v. United States, 444 U.S. 164, 174-75 (1979).

Petitioners nonetheless suggest that Penn Central should be reconsidered because, they assert, landmarking ordinances do not provide "an average reciprocity of advantage" for landmark owners. Petition at 11-12. This argument should be rejected for two reasons. First, contrary to Petitioners' suggestion, this Court has never elevated the concept of "reciprocity of advantage" to a determinative standard for whether a regulation constitutes a taking. At most, the Court has, on certain occasions, considered the presence or absence of "reciprocity of advantage" as a factor that may be relevant to determination of a takings challenge. See, e.g., Hodel v. Irving, 481 U.S. at 715 (Court considers "average reciprocity of advantage" as one of several relevant

factors in determining constitutionality of challenged statute).[19]

Second, Petitioners' argument that the Landmarks Law provides them with burdens but no benefits is incorrect. In Penn Central, this Court rejected the argument that landmarking confers no reciprocity of advantage on the landmark owner:

> In any event, appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal -- all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures,

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19. This Court has never squarely based a takings decision on the concept of reciprocity, which was first referred to by Justice Holmes in decisions such as Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). In Pennsylvania Coal, Justice Holmes, writing for the Court, found unconstitutional a statute prohibiting underground coal mining that might cause the collapse of certain private structures. Justice Holmes distinguished an earlier case involving a similar statute because that statute "was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws." 260 U.S. at 415. But the Court's actual holding in Pennsylvania Coal was based on the findings that the statute protected private rather than public interests and that it rendered coal mining "commercially impracticable." Id. at 413-14. See Keystone, 480 U.S. at 484 (describing the Pennsylvania Coal holding).

> both economically and by improving the quality of life in the city as a whole -- which we are unwilling to do -- we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in Miller, Hadacheck, Euclid, and Goldblatt.

438 U.S. at 134-35.[20] This determination of reciprocity of advantage applies equally to Petitioners, if not more so. As theatre owners who are in the business of marketing art and culture, they benefit substantially from the Landmarks Law's contribution to New York City's status as a cultural mecca, which attracts potential audiences to the City.

Petitioners further assert that the Landmarks Law violates the Due Process Clause because it does not conform to a comprehensive plan. Petition at 14. Petitioners argue that while the Penn Central Court determined that the Landmarks Law "embodies a comprehensive plan," 438 U.S. at 132, subsequent decisions of the New York Court of Appeals render this conclusion invalid. Petition at 12-13. Petitioners' argument is misplaced for two reasons. First, subsequent decisions of the New York Court of Appeals do not cast any relevant gloss on this Court's decision in Penn Central.

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20. This Court's subsequent decisions have reiterated that the Takings Clause does not require that the benefits and burdens of a regulation be equally balanced. As the Court explained in Keystone, "[t]he Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received." 480 U.S. at 491 n.21.

Second, in Penn Central this Court found that, "[i]n contrast to discriminatory zoning, . . . the New York City [Landmarks] [L]aw embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city. . . ." 438 U.S. at 132. In a footnote, the Court recognized that the New York Court of Appeals had "stated at one point that landmark laws do not 'further a general community plan.'" 438 U.S. at 132 n.28 (citation omitted). However, since the New York Court had "also emphasized that the implementation of the objectives of the Landmarks Law constitutes 'an acceptable reason for singling out one particular parcel for different and less favorable treatment,'" this Court did "not understand" the Court of Appeals to disagree with its characterization of the law. Id. No subsequent decision of the New York Court of Appeals calls into question that understanding or otherwise undermines this Court's decision in Penn Central.

Finally, Petitioners' claim that "equal protection limitations" are implicated by the Landmarks Law, see Petition at i, does not withstand scrutiny. With regard to an equal protection claim, the standard is deferential. Respondents need only show that the Landmarks Law is "rationally related to a legitimate state interest." New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Pennell v. City of San Jose, 485 U.S. 1 (1988). In Pennell, the Court considered an equal protection challenge to a rent control ordinance, in which landlords with low-income tenants argued that they were disparately treated as compared to landlords without such tenants. The Court rejected the argument, stating that:

> In light of our conclusion above that the Ordinance's tenant hardship provisions are designed to serve the legitimate purpose of protecting tenants, we can hardly conclude that it is irrational for the Ordinance to treat certain landlords

> differently on the basis whether or not they have hardship tenants.

485 U.S. at 14. Similarly, since the Landmarks Law serves the legitimate purpose of protecting landmarks, it is hardly irrational for the Landmarks Law to treat certain property owners differently on the basis whether or not their buildings meet the Landmarks Law criteria for designation. Id.[21]

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21. Save the Theatres did not brief in the courts below, and will not discuss here, Petitioners' challenge to the Special Demolition Permit requirement in the New York City Zoning Resolution, see Petition at i (fourth question presented for review).

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully Submitted

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Of Counsel:
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April 27, 1992

# APPENDIX

Affidavit of Jack L. Goldstein,
Sworn to on October 21, 1988
(Appellate Joint Appendix at 5559-81)

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK :
IAS PART 35

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THE SHUBERT ORGANIZATION, Inc., et al.,

Petitioners-Plaintiffs,

-against-

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents-Defendants.

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Affidavit of
Jack L. Goldstein

State of New York )
County of New York

JACK L. GOLDSTEIN, being duly sworn, deposes and says:

Introduction

1. I am a director of Save the Theatres, Inc., a nonprofit organization comprised of professionals from every creative and technical discipline involved in the Broadway theatre community. Together with Actors' Equity Association, the Society of Stage Directors and Choreographers,

United Scenic Artists Local 829, and the Dramatist Guild, Save the Theatres has moved for leave to file amicus papers in this proceeding because of its integral involvement in the Broadway theatre landmarking process, and its firm and deeply held belief that the individualized, carefully considered landmark designations challenged by the theatre owners are not only proper but essential to the survival of Broadway theatre. I am familiar with all the relevant facts leading to the designations, and submit this affidavit in support of (a) our motion for leave to participate as amici in these proceedings and (b) the challenged landmark designations.

Origin Of Save The Theatres

2. In 1979, the Broadway theatre community was shaken by the planned demolition of the Helen Hayes, Morosco, Bijou, Gaiety and Variety Theatres. These theatres, all built as legitimate Broadway houses, with the first three in active use at the time, were scheduled to be razed in order to build the City-sponsored Portman Hotel project (now the Marriott Marquis). The stated purpose of this project was to contribute to the revitalization of the Broadway Theatre District. In response, the Council of Actors' Equity Association formed the Committee to Save the Theatres to organize the theatre community's efforts to prevent the demolitions, and to bring public attention to the profound loss to Broadway's past and future if the theatres were destroyed.

3. To the vast majority of theatre people -- excluding the major theatre owners and the League of American Theatre Owners and Producers -- the concept of revitalizing the Theatre District by destroying the very theatres which made it a unique national asset was unacceptable and illogical. The Committee sought to convince the City to request a redesign of the hotel which would incorporate into

the new building the three theatres then in use. This solution would have satisfied both the "growth" policy of the City and the legitimate claim of the majority of theatre people and theatregoers to protection of their cultural and aesthetic interests.

4. Despite a spirited and honestly fought campaign, the Committee's efforts failed. The theatres were demolished sequentially during the first half of 1982. The continuing position of the City throughout the long controversy was that while the Committee's "build-over" plan for the theatres had merit, and might have been the optimum solution had it been advanced earlier, the project had proceeded to the point that major design changes were impossible.

5. Determined to avoid such confrontations in the future, the Committee decided that a permanent theatre preservation organization was the best insurance. Save the Theatres was incorporated in October of 1982 as an independent, not-for-profit organization chartered to educate the public, locally and nationally, to the architectural and cultural importance of historic theatres and the art of live theatre which they house.

Composition And Program Of Save The Theatres

6. Although initially established by actors, Save the Theatres has through its policies and programs reflected the fact that theatre is a collaborative art, the success of which depends upon the cooperation of talented people in many disciplines. We continue to speak for a broad-based constituency of theatre professionals, as well as thousands of theatregoers who support and attend Broadway theatre. Our efforts have been encouraged and publicly endorsed by Actors' Equity Association, the Society of Stage Directors and Choreographers, The Dramatists Guild, United Scenic Artists, The American Guild of Musical Artists, The

American Federation of Musicians, and the Theatrical Wardrobe Union; related entertainment unions such as the Screen Actors Guild, the American Federation of Television and Radio Artists, the American Guild of Variety Artists and the Directors Guild of America; and organizations such as the New York State AFL-CIO and the American Federation of Teachers. Save the Theatres has more than 8,500 supporters.

7. The four unions who join Save the Theatres in moving for amicus status represents the thousands of actors, directors, choreographers, designers, playwrights and musical performers who are the individuals who actually create the theatre for which Broadway is world famous. They are collectively responsible for the Broadway theatre's enormous economic contribution both to the City and to the producers of theatre. The theatre professionals represented are informed individuals who know the requirements of their professions extremely well, and wish only to protect the conditions which make it possible to do what they do best, to their benefit and that of many others.

8. Because theatre is a cooperative effort, weakened by division, it has been a major concern of our supporters, and therefore a major goal of Save the Theatres, to heal the serious rift within the theatre community caused by major theatre owners' active support of the demolitions of the Helen Hayes and Morosco Theatres.

9. Then, as now, the theatre owners were the wealthiest and most powerful individual members of the Broadway theatre community, as well as the stewards of its theatres. Their supporting role in the destruction of the Helen Hayes and Morosco was a profound shock to the community at large. The Helen Hayes and Morosco were successful, independently owned competitors of the major theatre owners' houses. We had hoped, however, that the

major theatre-owning organizations would overlook narrow business interests and at least attempt to apply their considerable influence on behalf of the overwhelming concerns of the community. Their failure to do so, while discrediting them in the eyes of their fellow theatre people, has not diminished their vital role in the theatre industry, nor wholly delegitimized their reasonable interests. Therefore, Save the Theatres has been a strong advocate for the owners' concerns as well, when they have been consistent with the greater health of the community and industry to which they are one contributing component.

10. Save the Theatres' initial program for the preservation of the Broadway theatres was to a large extent established by the conditions existing at the time of the demolitions of the five theatres. The following three circumstances contributed most significantly:

a. Because the Helen Hayes and Morosco Theatres were eligible for inclusion on the federal National Register of Historic Places, and the hotel project was in part federally funded (via a HUD Urban Development Action Grant), the federal authorities conditioned ultimate permission to demolish the buildings on mitigating measures which included a case-by-case review of each of the remaining historic Broadway theatres to determine if any was eligible for local or national designation as landmarks. See Record ("R") 1-6.

b. During the height of the demolition controversy, the City began the final public review process for amendments to the Zoning Resolution for Manhattan's west Midtown area. These amendments, which the Board of Estimate adopted in May 1982, permitted for a six year period larger buildings than previously were allowed and in effect targeted the Theatre District for

massive redevelopment. To attempt to defuse the inherent threat to the remaining theatres by this sudden focus of real estate development and appreciation of land values, which the City itself recognized, the amendments included a temporary Special Demolition Permit requirement to prevent forty-four listed Broadway theatres from demolition without prior approval from the City Planning Commission, while the Planning Commission could undertake a comprehensive review of plans for the Theatre Subdistric. These 1982 amendments also conferred on the owners of landmarked theatres expanded opportunities to transfer development rights, and made available certain incentives and bonuses to listed theatres that met specified conditions.

c. The Board of Estimate also directed the Mayor to establish a Theatre Advisory Council to advise the City Planning Commission in developing a plan to ensure the long-term viability of the Broadway theatres. Ellen Burstyn, then President of Actors' Equity Association, was appointed to this Council.

11. All of these factors convinced us that while the City had failed to protect the Helen Hayes and Morosco Theatres, we had made considerable strides in bringing the special qualities and importance of the theatres to its attention. It was apparent that an honest commitment had been made by City Hall to study the matter carefully and to craft a policy in which the theatres could exist side by side with new development in the District. As this systematic examination could only benefit from the theatrical expertise at our disposal, Save the Theatres decided to participate in every aspect of the exhaustive exploration of the cultural, aesthetic, and historical importance of each of the theatres considered for landmark designation.

The Initial Landmarks Hearings

12. After demolition of the Morosco Theatre on March 22, 1982, the City scheduled for June 14 and 15, 1982 public hearings before the City's Landmarks Preservation Commission ("LPC" or "Commission") on the proposed designations of the remaining theatres. In less than three months, with the help of volunteers, Save the Theatres researched from their first opening nights the production histories of each of the 45 calendared theatres,[1] and summarized the architectural features and historic events which made them individually important. These reports were submitted into the record at the hearings. See R 1295-1838. Further, we organized and presented testimony at the hearings, finding theatre professionals -- actors, set designers, playwrights or directors -- with personal experience of a particular theatre to speak before the LPC. Well-known architects were also asked to testify, to inform the LPC of the technology of theatre design, and to explain the relationship among design elements, acoustics, sightlines, audience/stage relationships and decorative schemes, so that the LPC would fully understand the tie between the excellence of these elements found in the Broadway houses and the success of the Broadway theatre experience. Historians, critics and writers were asked to place the theatres within the context of the development of American musical and dramatic theatre, and to describe how the future of those art forms depended on the existence of these spaces which were specifically designed to convey the event of theatre.

13. While the ultimate outcome of the LPC's review was far from assured, all of this testimony was framed so that the LPC could begin to measure each theatre against

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1. Thirty eight theaters were proposed for both exterior and interior designations; seven theaters were proposed for interior designation only.

the specific requirements of the Landmarks Law. Each of the theatres was addressed during the two full days of public hearings on June 14-15, 1982, and hundreds of pages of documentation were introduced into the record for future study by the staff and Commissioners of Landmarks. The record of these hearings remains one of the most thorough documentations of the Broadway theatres extant.

14. At the beginning of the June 1982 hearings, the theatre owners requested that the public record be kept open, claiming they had not had sufficient time to prepare testimony on their individual holdings. Community Board 5, wishing to carry out its own independent and thorough review, made a similar request. We raised no objections, wishing the matter to have the fullest airing.

15. Consequently, the matter was held over for another four months and a subsequent hearing was held on October 19, 1982. By that time Community Board 5 had researched each theatre at length, and supported 65 of the 83 proposed designations. The Community Board's testimony and written submissions at the October hearing were notable in their specificity and depth of research. R 569-1294.

16. At the October 1982 hearing, the theatre owners raised no specific bars to eligibility of any theatre based on the criteria of the landmarks statute, but focused their opposition on what they perceived to be an inherent imposition on their business holdings if landmarks designations were granted. Their testimony was notably brief in comparison to pro-designation comments, particularly considering the weightiness and complexity of the matters involved. Whether the testimony they did offer was germane to the Commission's mandated attempt to gather information on individual theatres in accordance with its responsibility under the law is open to question.

17. With the close of the October 1982 hearing the Commission began its extensive review of the testimony.

The Theatre Advisory Council

18. The Theatre Advisory Council was established by the Mayor in May 1982 as a result of the Midtown zoning amendments. The Council was charged with making recommendations to the City Planning Commission to assist it in developing a comprehensive plan to ensure the long term viability of the Broadway theatres. The Council was comprised of the theatre owners; other representatives of the theatre community, including Ellen Burstyn of Actors' Equity; members of Community Board 5; Save the Theatres board member Barbara Handman; architects; lawyers; a real estate developer; and representatives of the community at large. Ellen Burstyn asked me to serve as her designee to the Council. I have attended every one of its meetings over the past six years.

19. In retrospect, it would have perhaps been wiser of the Mayor to have created a Council on which no theatre person sat, but one made up entirely of disinterested parties to which theatre interests would have been required to make their case. As the Council's activities involved recommendations, particularly those related to zoning benefits, which potentially and ultimately involved financial gain for the theatres as private property, the 50 meetings which led to the Council's report might have been fewer and less stormy if those decisions had been left to others.

20. Not surprisingly, landmarks designation immediately became a source of controversy on the Council. Theatre owners lobbied strongly for a recommendation against designations of any of the theatres, while others, like Ms. Burstyn and Ms. Handman, argued that the Commission, a duly established City agency, should be allowed to carry out

its duty to the public to judge each theatre on its individual merits by the criteria set forth under the Landmarks Law. Disagreement over this issue contributed to a deadlock which prevented the Council from issuing a unified report for two years. Finally, in 1984, I was asked by the Council's chairman to write compromise language for the section of the report dealing with the question of landmarks which would be acceptable to both sides of the argument.

21. The Council's members, including the theatre owners, had agreed at an early meeting that none of their actions or recommendations would undermine existing laws. Working from this guiding principle, I proposed language which recommended that the Landmarks Commission review the theatres independently, according to its standard practices and procedures, free from any interference. That language was adopted by the Council.

22. I further proposed language to the effect that the LPC should carry out its review fully informed of the special nature of theatre architecture, especially in connection with the proposed designation of interiors. This issue deserves some further explanation.

The Theatre Interiors Guidelines

23. Almost from the outset of the City's consideration of landmarks designation for the theatres, theatre owners had raised the concern that interior designations would restrict the creative freedom of set designers and producers in connection with desired changes to the auditoriums of theatres to create a special mood for a play or musical. Owners contended that review of proposed changes under LPC's Certificate of Appropriateness procedures would add time delays and increase the cost of production. This concern continued to be voiced during the Theatre Advisory Council's discussions.

24. As I have mentioned, Save the Theatres's supporters are people who make their livelihood in the theatre, professionals who are fully aware of the complexities involved in mounting shows, and who were therefore very interested in the point being raised by the theatre owners. It was certainly not in anyone's interest to support landmark designation of the theatres if these designations would interfere with productions. The Landmarks Commission also wished to address this concern in a responsible manner, and Save the Theatres therefore arranged for a committee of set and lighting designers to meet with the LPC before the Commission drafted unique operational guidelines to deal with the issue.

25. The guidelines ultimately went well beyond their original intent, dealing not only with temporary production related changes to the interior of theatres, but with state of the art technical changes associated with productions, and even with exterior treatments. The guidelines, drafted specifically for the theatres, were an unprecedented step which provided that any reversible production related changes to the designated interior could be carried out without review by the LPC, so long as the Commission was simply informed by letter that changes were taking place and that the theatre would be returned to a similar state when the show closed.

26. Therefore, even a production as sweeping in its modifications as "Cats," where the entire auditorium of the Winter Garden Theatre was decorated, could proceed in a designated interior with no impediment or review. Similarly, the guidelines provided that state of the art technical changes required by a production could be installed freely, if in a reversible manner, and could even be carried over to an unlimited number of subsequent productions with simple notification to the LPC.

27. The guidelines were an effort on the Commission's part to address a valid concern of the theatre owners that touched upon the greater health of the theatrical community. They were developed in consultation with experts in the field and with the participation of the theatre owners themselves. A public hearing was held on the guidelines, and they were adopted by the LPC on December 10, 1985.

28. We were satisfied that the problem identified by the owners had been fairly resolved and remain convinced that interior landmarks designation, creative freedom, and efficient production schedules are compatible. See accompanying Affidavit of Ming Cho Lee. It is important to note that throughout the entire six year review and landmark designation process, United Scenic Artists has remained firm in its support of interior designation and of the guidelines which its members helped create.

29. Although possible restrictions on creative freedom of set designs was the initial problem identified by the owners, passage of the guidelines had no discernible effect on owner resistance to interior designation. The guidelines, which are a clear guarantee of non-interference in production related and state of the art changes, do require a level of restoration after a production closes. While this does not apply to state of the art installations such as light bridges and sound systems, which can be carried over upon simple notification to an unlimited number of productions, theatre owners have continued to contend that any requirement that a theatre be restored to its approximate appearance will spell financial ruin. This contention is curious at best.

30. Restoration of theatre interiors which have been significantly modified for a particular production is a fact of theatre life, totally unrelated to landmarks designation. Production of any new play in the Winter Garden Theatre, for instance, will require a restoration of the theatre simply

because the "Cats" set is so specific to the play. This cost is normally borne by the producers, not specifically by theatre owners (remembering that there are many other producers on Broadway aside from those who also own theatres). Because the need for post-production restoration is not an issue specifically or solely related to landmarks, the theatre owners' focus on the cost of restoration is misleading.

31. The matter of the theatre owners' consistent objection to landmark designation in the face of unprecedented cooperation by the LPC, City government and the remainder of the theatrical community, comes down, I believe, to objections to simple accountability to an independent authority. Resistance to this on the part of the theatre owners is no different from that of any other property owner. Accountability may be confining, but it is the very crux of the Landmarks Law. When certain buildings achieve a level of overwhelming cultural and architectural importance, some accountability to the public for their preservation is mandated and warranted.

The Initial Landmark Designations

32. While the LPC was examining the record that had been developed during the 1982 hearings, the Theatre Advisory Council was preparing a report summarizing its deliberations and recommendations. The report was approved in June 1984 and published in October 1984.

33. In August 1985, the LPC voted to designate the exterior of the ANTA (Virginia) Theatre, the interior and the exterior of the Alvin (Neil Simon) Theatre and the interior and exterior of the Ambassador Theatre. It voted against the designation of the ANTA interior as failing to meet the criteria for eligibility under the law.

34. The initial designations came before the Board of Estimate in December 1985, after the special guidelines governing interior and exterior production related changes had been officially approved by the LPC. Testimony during public hearings was overwhelmingly in support of designation (save that of the owners and their associates), and the Board of Estimate approved four of the five designations, rejecting the designation of the exterior of the Ambassador Theatre.

35. The Board, however, in responding to the interests of the theatre owners, did agree (despite the recommendation of the Theatre Advisory Council to the contrary) to lift the Special Demolition Permit zoning restriction for any theatre designated a landmark. This was a reasonable action on the part of the Board, which determined that "double-processing" was an unnecessary burden should any owner seek to demolish a theatre, and that the well-tested hardship proceedings under the landmarks statute were sufficient. Language confirming and clarifying the Board's decision was adopted by the Board in October 1987. See Zoning Resolution §81-742.

36. During the December 1985 proceedings before the Board of Estimate, Comptroller Harrison J. Goldin requested that the LPC not bring further theatre designation recommendations to the Board until all the theatres then in use as legitimate houses had been reviewed. While we understood that this request would by definition delay conclusion of the process, we raised no objections to it at the time. One unintentional, though unfortunate, outcome of the request has been that when the LPC finally did bring the remainder of its designation proposals to the Board early during 1988, the fact that so many theatres were found to meet the criteria for designation was misinterpreted by some as evidence of arbitrary, sweeping designations, whereas in fact they resulted from the individual examination of the

theatres which took place during the LPC's executive sessions.[2]

The Remaining Designations

37. Following the initial four designations, the numerous designation reports on theatre interiors and exteriors were compiled. These reports are models of scholarship which will provide a valuable reference for theatre and architectural historians. Although the record on the remaining theatres had been officially closed, because some new Landmarks Commissioners had been appointed, an opportunity for further public testimony was offered in late 1985 or 1986. This provided ample occasion for any new testimony which could be deemed necessary additions to the already considerable documentation at the LPC's disposal.

38. In executive sessions from November 1987 to January 1988, the LPC recommended that of the 75 remaining interior and exterior proposed designations, 26 interiors and 21 exteriors satisfied the applicable criteria. Although the recommendations fell short of our expectations, leaving many theatres unprotected, we accepted the decision of the Commission, understanding that its responsibility was first to the integrity of the Landmarks Law, and that it had exercised that responsibility judiciously.

39. When the remaining proposed designations came before the Board of Estimate for approval on March 10, 1988, they again, despite considerable lobbying by owners, had the support not only of the vast majority of the theatre community but of preservation organizations such as the

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2. In July 1987, the LPC considered separately the proposed designation of the Palace Theater at the request of its owner. LPC voted to designate the Palace interior and this designation was approved by the Board of Estimate in October 1987.

Landmarks Conservancy and the Municipal Arts Society, which monitor and guard the proper application and careful exercise of the Landmarks Law. The Board of Estimate approved the designations that had been recommended by the LPC.

Conclusion

40. As an instrumental player in the long process which led to the designations, Save the Theatres can now look to the situation regarding the future of the Broadway theatres with some assurance. Many are designated landmarks. Expanded opportunities to transfer development rights are available to the owners of those theatres.

41. We can also look back on the long process leading to designation as a responsible and well reasoned exercise of a valuable public statute applied in behalf of the public good. Although we believed that all 83 of the proposed interior and exterior designations were justified, we accepted as of independent value the need for discrete and defensible exercise of the Landmarks Law.

42. Action by the LPC and the Board of Estimate has placed the protective shield of law over many of the theatres and that is the most important outcome of the process. Of the 90 or more theatres that used to comprise the Theatre District, these few are left. Their destruction would not only erase vital chapters of our cultural history but also prevent further theatrical history from being made. See accompanying Affidavit of Colleen Dewhurst.

43. The designated theatres, which cannot be replaced or duplicated by any currently feasible means, are the necessary architectural instruments which allow the complex communication between audience and actor to take place. Without them, the art they contain cannot retain its vitality

or meaning, and Broadway will cease to be the premiere home of theatre in America. That is the eventuality that theatre people have sought to avoid, and why they have, despite the evident difficulties, continued to oppose their major employers in the matter of designation.

44. For all of these reasons, I urge the Court to (a) grant our motion for leave to participate as amici in these proceedings and (b) uphold the challenged landmark designations.

/s/
Jack L. Goldstein

Sworn to before me this
21st day of October, 1988

/s/
Notary Public

**Affidavit of Ming Cho Lee,**
**Sworn to October 21, 1988**
**(Appellate Joint Appendix at 5588-98)**

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK :
IAS PART 35

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THE SHUBERT ORGANIZATION, Inc., et al.,

Petitioners-Plaintiffs,

-against-

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents-Defendants.

Affidavit of Ming Cho Lee

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State of New York ss.:
County of New York

MING CHO LEE, being duly sworn, deposes and says:

Introduction and Background

1. I am a scenic designer. I have designed sets for more than 20 Broadway shows, including K2, for which I won the Tony, Outer Critics Circle, Drama Desk and

Maharam awards in 1983. Other Broadway shows that I have designed include Mother Courage (1963), Slapstick Tragedy (1966), A Time for Singing (1966), Little Murders (1967), Here's Where I belong (1968), Billy (1969), La Strada (1969), Lolita (1971), Two Gentlemen of Verona (1971), Much Ado About Nothing (1972), The Glass Menagerie (1975 and 1983), For Colored Girls... (1976), Romeo and Juliet (1977), Shadow Box (1977), The Grand Tour (1978), and Execution of Justice (1986).

2. I have designed more than 30 shows at regional theatres including the Arena Stage in Washington, D.C., the Ahmanson Theatre and Mark Taper Forum in Los Angeles, the Guthrie Theatre in Minneapolis, the Long Wharf Theatre in New Haven, The Brooklyn Academy of Music, and the American Shakespeare Theatre in Stratford, Connecticut.

3. I have also designed more than 40 operas for New York City Opera, Metropolitan Opera, Lyric Opera of Chicago, Covent Garden (London), San Francisco Opera, Dallas Civic Opera, and for various other opera companies throughout the United States and Europe.

4. I have designed scenery for more than 20 dance productions by the following companies: American Ballet Theatre, Jose Limon, Martha Graham, Gerald Arpino (Robert Joffrey Company), Alvin Ailey, and Eliot Feld.

5. As principal designer for The New York Shakespeare Festival from 1962-73, I designed more than 40 productions at the Delacorte Theatre in Central Park and at the Public Theatre downtown.

6. I designed the Anspacher and Newman Theatres, which are part of the Public Theatre, and served as an architectural consultant in connection with the construction

of two theatres in Cincinnati and the Performing Arts Center in Purchase, New York.

7. In addition to my designing activities, since 1968 I have taught scenic design at the Yale University School of Drama. I have been co-chairman of the Design Department at Yale since 1979. As part of my responsibilities at Yale, during the last 17 years I have supervised the scenic design of all productions at the Yale Repertory Theatre, which number approximately 14 per year.

8. I was born in 1930 in Shanghai, China, and was naturalized as a United States citizen in 1961.

9. I submit this affidavit in support of (a) the motion of Save the Theatres, Inc., Actors' Equity Association, the Society of Stage Directors and Choreographers, United Scenic Artists Local 829 (of which I am a member), and the Dramatists Guild for leave to participate in these proceedings as amici curiae, and (b) the individual designations of the twenty-two Broadway theatres whose owners have commenced this litigation. Specifically, I am aware that the theatre owners claim that the designation of theatre interiors will create undue delay and difficulty in the production of Broadway shows. I am familiar with the demands of scenic design, and wish to apprise the Court of my professional view that the guidelines governing proposed alteration of a designated theatre interior are both reasonable and essential, and will not prevent or impede in any way the mounting of productions on Broadway. In addition, I wish to set forth the reasons why the landmarking of the theatres in question is necessary to preserve and extend the heritage of theatre art in New York City.

The Interior Guidelines

10. Due to concern that the proposed designations of various Broadway theatre interiors might delay or impede necessary production related changes, the "Guidelines For Treatment of Theatre Interiors" were adopted by the Landmarks Preservation Commission ("LPC") on December 10, 1985. The LPC devised the guidelines after extensive consultation with prominent, practicing scenic and lighting designers. The procedures embodied in the guidelines govern both production related and permanent changes to a designated theatre interior.

a. Production Related Changes

11. The guidelines provide that production related work affecting designated portions of a theatre interior may be undertaken and completed without an application to the LPC if (a) certain conditions are satisfied (see paragraphs 14-17 below) and (b) the owner submits in writing to the LPC a description of the scope of the proposed work and a commitment to return the interior to its prior condition if significant architectural features are proposed to be altered.

12. Submission of a written description of the scope of proposed work is not a difficult requirement for an owner to meet. In most if not all cases, the scope of work, including necessary drawings and specifications, would have to be prepared anyway by the production designer who plans the changes and the contractor who performs the work. Copies simply could be forwarded to the LPC.

13. Nor is the requirement to return the theatre interior to its prior condition especially burdensome. In the event of major interior renovations for a specific production (such as "Cats" or "Starlight Express"), the theatre would have to be returned to its prior condition anyway in order to

accommodate a subsequent incoming production. If the incoming production required a continuation of the initial changes, or new changes, the guidelines permit the owner to postpone restoration of the interior until the close of that production, all without any LPC review. Restoration, of course, is necessary in order to preserve the architectural, aesthetic, or historical character of each of the designated interiors.

14. The four specific conditions that must be satisfied in order for an owner to make production related changes without prior LPC review or approval are reasonable and necessary. First, the interior configuration of the theatre -- its interior geometry -- must be maintained. This is essential in order to preserve the fundamental design of the theatre. The physical relationship between performer and audience is determined by a theatre's interior configuration. It is perhaps the most basic element in determining the nature and quality of the live theatrical experience.

15. The second condition is that any alteration to architectural features highlighted in the Designation Report must be reversible. This is a necessary requirement. Along with the configuration of an interior, architectural features separate great from ordinary theatres. They give the theatre its human scale, adding to the intimacy of the theatrical experience and allowing performer and audience to communicate in the manner that is unique to live theatre. Ornamentation is also crucial to the acoustics of a theatre; when ornamentation is removed the result can be acoustical chaos.

16. The third condition precedent to production related changes without LPC review or approval is that, if a contrasting color scheme is changed to a noncontrasting one, a contrasting scheme must be returned after the production closes. This requirement is necessary because contrasting

colors highlight fragmentation or ornamentation on a theatre surface, making visible high or medium relief. As is the case with changes in interior configuration, the return to a contrasting color scheme is not mandated if a new incoming production requires noncontrasting colors. Moreover, the guidelines impose no restrictions on the actual colors used, mandating only that the contrast, which is necessary to preserve important aesthetic features of the theatre interior, be returned.

17. Finally with regard to production related changes, if a Department of Buildings permit is required for the work, an owner must submit to the LPC an application for a certificate of no effect. However, the guidelines provide that such a certificate "will be issued" by LPC staff within five working days of receipt of a completed application. This is a minimal delay, and since it would occur during the pendency of an application to the Buildings Department it would work no prejudice on a theatre owner or producer. The guidelines mandate that the certificate be granted by the LPC.

18. I understand that the theatre owners claim that interior designation will hinder the scenic designer's creative work. I disagree. In my professional opinion the guidelines that have been adopted by the LPC more than reasonably meet any rational production related concerns, and are essential to preserve the integrity of the designated interiors as live theatre spaces. Furthermore, a scenic designer's job is to design an environment within an existing space. The given geometry of a theatre, and its architectural detail, influence a set designer's vision. They are liberating constraints within which the designer creates. That is the set designer's art.

b. Permanent Alterations

19. Before permanently altering a designated interior, an owner must apply to the LPC. However, the guidelines provide that, within five working days of receipt of a completed application, a certificate of no effect permitting the proposed work "will be issued" by the staff if three conditions are satisfied.

20. The first condition is that the interior configuration of the theatre must be maintained. For the reasons stated in paragraph 14 above, this requirement is essential in order to vindicate the underlying purpose of interior landmarking.

21. The second condition is that the LPC staff must determine that the proposed alteration would not affect significant architectural features highlighted in the Designation Report. For the reasons stated in paragraph 15 above, this requirement also is essential. Special architectural features help to make the interior a landmark; if they are destroyed, then the purpose of landmarking has been lost.

22. Finally, with regard to the installation of state of the art changes such as light bridges or sound booths, the LPC staff must find that their installation will not affect the physical fabric of the significant interior features of the theatre or that such an effect is reversible. This is justified in that any irreversible state of the art installation that will affect the interior should be subject to a permitting procedure under the regulations generally applicable to designated landmarks. On the other hand, reversible changes, or ones that the LPC staff determines will not affect significant interior features, can go forward without prior LPC review or approval.

c. Recourse To Normal LPC Procedures

23. The interior guidelines, which apply solely to designated theatres, ease the way for the theatre owners and producers, affording greater flexibility than otherwise would be available under the Landmarks Law. In this regard I note that for any proposed change in which the conditions prescribed in the guidelines are not met, the normal LPC review and approval procedures are available for an owner who wishes to alter a designated theatre. In light of the integral importance of designating the theatre interiors that the LPC has carefully selected as landmarks, see paragraphs 24-26 below, this seems more than fair.

The Importance of Landmarking

24. A theatre interior is a totality, an environment that physically defines the relationship between performer and audience. Even if not independently outstanding, every detail is part of that environment.

25. The designated Broadway theatres are unique in the world. Elements of their interior design and ornamentation were crafted by hand; we have lost the art of building theatres that way. Interior features give the theatre its human scale, which in turn permits the intimate communication vital to live theatre.

26. There is a continuity in the theatre art that originates in the past. In part it is contained in the designated theatres themselves. Urban society, and theatre itself, demand a sense of history. In this way, the live theatre differs fundamentally from video or other forms of contemporary entertainment. Everything in the live theatre is custom-made. It exists on a human scale. It is that essential sympathy, established within the physical world of the theatre interior, that provides the opportunity for

connection between audience and performer, and between our present and our past.

27. For the foregoing reasons, I support the landmark designations of each of the twenty-two Broadway theatres owned by the petitioners, and urge the Court to (a) grant our motion for leave to participate in these proceedings as amici and (b) uphold the challenged designations.

/s/
MING CHO LEE

Sworn to before me this
21st day of October, 1988

/s/
Notary Public

**Affidavit of Colleen Dewhurst,**
**Sworn to on October 20, 1988**
**(Appellate Joint Appendix at 5582-87)**

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK :
IAS PART 35

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THE SHUBERT ORGANIZATION, Inc., et al.,

Petitioners-Plaintiffs,

-against-

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents-Defendants.

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Affidavit of Colleen Dewhurst

State of New York ss.:
County of New York

COLLEEN DEWHURST, being duly sworn, deposes and says:

1. I am an actress. On Broadway I have performed in many plays, including A Moon For The Misbegotten (Tony Award), All the Way Home (Tony Award), You Can't Take

It With You, Mourning Becomes Electra, An Almost Perfect Person, Who's Afraid Of Virginia Woolf (revival; Tony Nomination), The Ballad Of The Sad Cafe, The Good Woman Of Setzuan, Tamberlaine the Great, and, most recently, Long Day's Journey Into Night and Ah! Wilderness.

2. I have also performed in films (including When A Stranger Calls, Tribute, and Annie Hall), and on television (for which I have received the Emmy and Gemini awards).

3. In June 1985, I was elected President of Actors' Equity Association, the union of all professional performers and stage managers in the legitimate theatre in the United States. Equity has 39,000 members. I am Equity's 11th president, and the second woman to hold that office since the Union was founded in 1913. I have served on Equity's Governing Council since 1983.

4. Among my other activities, I am a member of the Executive Board of the Actors' Fund of America, the Board of Directors of the American Council for the Arts, and the Policy Overview Panel and the Theatre Program Panel of the National Endowment for the Arts.

5. The Morosco Theatre was demolished in 1982, along with the Helen Hayes and three other legitimate houses. At that time, actors and other theatre professionals joined together to find a way to protect our shared heritage, so that we could help pass it along to our children. That is how Save the Theatres was born.

6. Since its inception, I have been on the Board of Directors of Save the Theatres, and I now serve as its Vice-Chair. I testified during hearings before the Landmarks Preservation Commission concerning the proposed designation of various Broadway theatres.

7. I submit this affidavit to express and explain to the Court the extraordinary importance to actors of sustaining the careful landmark designations that have been made by the City. I write as an actress, as President of Actors' Equity, and as an individual who has been involved integrally in the effort to ensure and advance our collective theatrical heritage.

8. The designated theatres are important to the actor's craft. They embody an emotional value which is essential to the quality of our work. All actors work within the tradition of acting, and it is to that tradition to which we turn, always and consistently in our professional life, as the measure of our performance. It is the excellence of that tradition to which we aspire and to which we are responsible. Acting is by definition an internal process in which emotion is the central material with which we work. Each of the designated theatres possesses its own personality, is an instrument that helps to give us voice.

9. One of my most distinct memories as an actress is performing in Eugene O'Neill's Moon For The Misbegotten at the Morosco Theatre in 1973. We had been out of town in Lake Forest, Illinois, and Washington, D.C. before we came to Broadway. We did not expect the show to succeed in New York. I remember the plaque on a door of the Morosco saying that O'Neill's first Pulitzer Prize winning play had been presented there. It made a difference. When I walked out onto that stage, I felt that it was populated by the great actors who had walked the boards before me. It inspired me, because of the history of the place, the continuity in the theatrical process that I was helping to maintain and extend.

10. Each of the other historic Broadway theatres functions in this way, making its own demands on the quality of our performance. The old Broadway houses welcome an

actor. They are our homes. Our teachers walked the boards. Our parents sat in the audience. Preserving and advancing this heritage is a debt we owe to our children. The designated theatres may be privately owned, but they belong to all of us.

11. These feelings are not merely magical. The acoustics in the old Broadway houses, the sight lines, their configurations and decor, enable the actor immediately and intimately to make contact with the audience. That is the crucial element in our art. The old Broadway houses were built with deep, implicit respect for the importance of that principle: contact among people. They were built by architects who could translate that principle into spaces of exquisite technology. Many new theatres, like the one that was built to replace the Hayes and Morosco, are antiseptic, a quality that discourages or kills the possibility for intimate communication between performer and audience. Theatre is a shared experience and the integrity of the physical space in which that connection takes place is critical to its survival.

12. At the moment of performance, the actor is the central element in the event of theatre. The work of playwrights, set designers, directors and choreographers contributes to the live communication between performer and audience. The designated theatres also, by the genius of their architecture, collaborate with us, by permitting and encouraging the experience we work to create. It is because they are so extraordinary in their architectural qualities that American theatre was born and grew up in them. It is that tradition that we wish to carry on.

13. Our landmarked theatres are the cultural heart of this City. The careful, individualized designations of the twenty-two theatres at issue in this proceeding are a clear and hopeful recognition of the historical, aesthetic value of

live theatre to New York and to the world. Actors' Equity and I applaud them.

14. For these reasons, I urge the Court a) to grant our motion for leave to participate as amici in these proceedings and b) to uphold the challenged landmark designations.

/s/
COLLEEN DEWHURST

Sworn to before me this
20th day of October, 1988

/s/
Notary Public

**Affidavit of Jack L. Goldstein**
**(Sworn to April 5, 1989)**
**(Appellate Joint Appendix at 2917-33)**

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK:
IAS PART 35

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THE SHUBERT ORGANIZATION, Inc., et al.,

Petitioners-Plaintiffs,

-against-

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents-Defendants.

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Affidavit of Jack L. Goldstein

State of New York )
County of New York

JACK L. GOLDSTEIN, being duly sworn, deposes and says:

Introduction

1. I am a director of Save the Theatres, an amicus and proposed intervenor in this proceeding. I am fully familiar

with the facts and prior proceedings, and submit this affidavit to counter the claim now advanced by the petitioners (or "owners") that the absence of a verbatim transcript of the public hearings conducted by the Landmarks Preservation Commission (the "Commission" or "LPC") on June 14-15 and October 19, 1982 invalidated the theatre designations recommended by the Commission and approved by the Board of Estimate in 1988.

2. I was present during all three days of hearings before the Commission in 1982. I was also integrally involved in the long administrative process that followed those hearings, up through final Board of Estimate approval of various landmark designations in March 1988.

3. Petitioners contend that because of the absence of a verbatim transcript of the three days of public hearings held in 1982, and because a substantial number of the Landmarks Commissioners present at those hearings had been replaced by the time of the final Commission votes in 1987 and 1988, the Commission did not consider the information or views presented by the owners at the original hearings. The extensive written record, numbering more than 6000 pages, upon which the Commission based its final designation decisions, demonstrates the preposterous nature of the petitioners' claim.

4. In fact, as I set forth fully below, <u>every</u> substantive argument advanced by the theatre owners during the 1982 hearings is fully reflected in the written record on which the Commission and Board of Estimate based their designation decisions.

5. The substance of the theatre owners' brief and generalized testimony before the Landmarks Commission on June 14, 1982 and October 19, 1982 (the theatre owners did not testify on June 15, 1982) is reflected in the record in (a)

the written summaries of each speaker's testimony at the hearings; (b) the architectural report on the theatres proposed for designation that was commissioned by the theatre owners and submitted to the Commission on their behalf; (c) the verbatim transcript of the additional public hearing held in December 1985 before the Commission; (d) the evidence of correspondence and personal meetings between the Commission and the theatre owners; and (e) the verbatim transcript of the March 1988 hearing before the Board of Estimate.

Each of the Substantive Points Made in the Owners' Testimony During the 1982 Hearings is Contained in the Administrative Record.

6. I was present throughout the three days of LPC hearings held on June 14-15 and October 19, 1982. I have also reviewed the verbatim transcript of the 1982 hearings which was recently prepared by the City and submitted to the Court. My review confirms that each substantive point raised by the owners or their representatives through oral hearing testimony appears in writing elsewhere in the record that was available to and reviewed the Landmarks Commission and Board of Estimate members who ultimately recommended and approved the theatre designations that petitioners now challenge. In the subparagraphs below, I summarize the five essential points made in the owners' oral hearing testimony, citing to the recently submitted volumes (XXXIV-XXIX) of the administrative record ("R") and then referring the Court to pages in earlier volumes of the record in which those views are expressed.

a. Owners need a comprehensive relief package, including freer transfer of air rights and tax abatements; landmarking alone will undermine not

enhance preservation of theatres. Gerald Schoenfeld, R 6570-74, 6578, 6588 ("these theatres are pieces of economic real estate")(June 14); John Zuccotti (for Nederlanders, Jujamcyn), R 6606 (June 14); Robert Nederlander, R 6627, 6631 (June 14), R 7376-77 (October 19); Richard Wolff, R 6636 (June 14); plus Paul Libin (Managing Director, Circle in the Square), R 6642-43 (June 14); and William G. Mallon (Vice President, Chemical Bank), R 6645 (June 14).

The substance of this argument appears in the record at 2502-03 (summary minutes of June 14 hearing testimony of Gerald Schoenfeld), 2502-2503 (summary minutes of June 14 hearing testimony of Robert Nederlander), 2503 (summary minutes of June 14 hearing testimony of Richard Wolff), 2516 (summary minutes of October 19 hearing testimony of Robert Nederlander); 1848, 1867, 1889 (from "Thirty Theatres," a report submitted by the owners' consultant Hugh Hardy (hereinafter "Hardy Report")), 2484 (letter from Gerald Schoenfeld to Mayor Koch, dated September 18, 1985). It should be noted that Kent Barwick, then Chairman of the LPC, who presided over the 1982 hearings, correctly pointed out that such economic considerations were beyond the purview of the Commission, which was considering the architectural, historical, cultural, and aesthetic merit of each building proposed for landmark designation, R 6555 (June 14); R 6839-40 (June 15); R 7375-76 (October 19).

b. Landmarking theatre interiors will inhibit owners' ability to accommodate in a timely fashion the needs of a new production and to install state-of-the-art technology. Mr. Schoenfeld, R 6591

(June 14), R 7211-12, 7343-44, 7351, 7364 (October 19); Mr. Nederlander, R 7379 (October 19); Mr. Wolff, R 7387-88 (October 19); Hugh Hardy, R 7391-93 (October 19); Robert McDonald (Stagehands Union), R 7258-60 (October 19)(no position regarding designation, merely expressing concern).

The substance of this testimony appears in the record at 1294 (October 5, 1982 testimony of Hildy Parks Cohen, member of Landmarks Committee of Community Board 5, to Landmarks & Cultural Affairs Committee); 2516 (summary of October 19, 1982 hearing testimony of Robert McDonald); 1844 (Hardy Report, stating that technology in the theatres is "outmoded"); 2926, 2934 (verbatim testimony of Gerald Schoenfeld at December 10, 1985 hearing before LPC).

c. Adjourn June hearings until October to give owners the opportunity to gather and present information regarding theatres proposed for designation. Mr. Schoenfeld, R 6576 (June 14); Mr. Zuccotti, R 6609, 6610-11 (June 14); Mr. Nederlander, R 6632-33 (June 14); Mr. Wolff, R 6635 (June 14).

The substance of this testimony appears in the record at 2502-03 (summary of June 14 hearing testimony of Gerald Schoenfeld); 2503 (summary of June 14 hearing testimony of John Zuccotti); 2503 (summary of June 14 hearing testimony of Robert Nederlander); 2503 (summary of June 14 hearing testimony of Richard Wolff). At the owners' request, the hearing was continued until October 19, 1982.

d. Keep record open after October hearing to give Mr. Hardy the opportunity to complete his report on 30 theatres proposed for designation. Mr. Schoenfeld, R 7210 (October 19)("so that we...will have a complete opportunity to be heard and a full record made for your consideration"); Victor Marrero (for Nederlanders, Jujamcyn), R 7255-56, 7430 (October 19); Mr. Nederlander, R 7372-73, 7376 (October 19); Mr. Wolff, R 7381 (October 19).

The substance of this testimony appears in the record at 2515 (summary of October 19 hearing testimony of Gerald Schoenfeld); 2516 (summary of October 19 hearing testimony of Richard Wolff). The record was kept open after the October 19 hearing, in order to allow Mr. Hardy to complete his report. Mr. Hardy's report, prepared at the behest of the owners, consumes 226 pages of the Commission record, R 1839-2065.

e. Consider designations on theatre by theatre basis. Mr. Schoenfeld, R 6575 (June 14).
The substance of this testimony appears in the record at 2503 (summary of June 14 hearing testimony of Gerald Schoenfeld). The Commission did consider each theatre building individually as is evidenced by the careful, extensive, individual designation reports prepared by LPC staff. R at Volumes XXIV through XXX.

7. Even minuscule elements of the owners' oral testimony during the 1982 hearings are contained elsewhere in the administrative record. For example, the Hardy Report contains a reference to the "light fixtures with colored glass" in the Belasco Theatre, R 1910. Mr. Schoenfeld had discussed these during the October 19 hearing, R 7352.

8. Mr. Hardy's report also includes a reference to the suspended lighting bridge that compromises the integrity of the Shubert Theatre ceiling design, R 1988. So does the Commission's own designation report for the Shubert Theatre, R 6079. Mr. Schoenfeld had mentioned this during the October 19 hearing, R 7357.

9. The Hardy Report rates the public space, including the adequacy of the lounge and restroom facilities, in each of the 30 theatres it considered, see, e.g., R 1910 (Belasco Theatre), 1955 (Majestic Theatre); see also R 2933 (verbatim transcript of December 10, 1985 hearing testimony of Mr. Schoenfeld, arguing that theatre lounges, lobbies and dressing areas should not be designated as landmarks). Mr. Schoenfeld had mentioned this during his October 1982 oral testimony, R 7365.

10. Thus, a review of the verbatim transcripts of the 1982 public hearings reveals that the substance of the owners' testimony is amply and repeatedly covered in the record that formed the basis for the Commission's and Board of Estimate's judgments on the proposed theatre designations.

The 1982 Hearing Transcripts Support the City's Decision to Designate Petitioners' Theatres.

11. The 1982 hearing transcripts are illuminating in other ways. First, there was a groundswell of public support expressed for the designations. The theatre owners, real estate powers of the theatrical business, were virtually alone in opposing designation. Literally hundreds of individuals, and organizations representing tens of thousands of New

Yorkers, testified in favor of landmarking. See, e.g., R 6989-7145 (June 15); R 7471-7531 (October 19).

12. Moreover, in contrast to the owners' generalized testimony, the proponents' support was substantive and to the point. Thus, in June 1982 those supporting designation submitted full and thorough documentation regarding each theatre's eligibility under the architectural and cultural criteria for designation. Oral testimony by the 75 speakers, all of whom were clearly recognized as responsible and, in many cases, renowned members of the theatre community were also recorded through the submission of written statements to the LPC. R 1295-1838. Review of this portion of the record will illustrate to the Court the depth and specificity of the proponents' research.

13. In stark contrast, the testimony presented by the owners at the June 1982 hearings was general comment, essentially negative to the process of landmarks designation. The owners did not conform their public remarks to the purpose of the Landmarks hearings, which was to elicit specific, informed opinion related to the individual characteristics of specific buildings under consideration for designation.

14. During the October 19 hearing the exhaustive report by Community Board 5 was submitted to the Commission. R 569-1294. This report supported 65 of the 83 proposed designations. The owners, however, offered essentially the same testimony as they had presented in June, and in light of the paucity of relevant information proffered by the petitioners regarding the individual eligibility of specific theatres, their comments were summarized for the record in a manner consistent with their utility. R 2515-16.

15. This is not to say that the general opposition of the owners to the process of Landmarks designation of their

properties was discounted, but rather to say that the matters of tax abatement and transfer of air rights -- which were the focus of the owners' testimony -- were not then (or ever) within the legal purview of the Commission, nor factors upon which the LPC could or should judge the architectural or cultural merits of the buildings under consideration.

The Hardy Report, Prepared for the Owners, Was Fully Considered by the City.

16. The key substantive submission to the LPC by the theatre owners was the Hardy Report, to which I referred above in paragraphs 6-9. This report, over 200 pages long, was submitted to the LPC on April 22, 1983 on behalf of the petitioners and concluded that "taken as a whole these 30 buildings are economically culturally and physically irreplaceable" although "the appropriateness of the Landmark designation for these structures should be considered in light of what it would mean to the design review process of the Landmarks Commission and to the development mandated by the City in the Theatre District." R 1845.

17. This study was specifically commissioned by the petitioners and represents their most thorough testimony on the individual qualities of their theatres. While it finds that the theatres evidently meet the criteria for designation under the law, the owners contended that such criteria, or at least the conclusion which must logically flow from applying these criteria, should be ignored or adjusted due to factors outside the ambit of the Landmarks Law.

18. Further elements of the Hardy Report are worthy of mention. First, Mr. Hardy rates every one of the 30 theatres he studied within the "A" (highest) range with

regard to the five factors that he considered relevant for consideration by the Commission. R 1899-1900.

19. Second, Mr. Hardy lists the theatres alphabetically, R 1893, a practice that petitioners' lawyers have decried in this litigation. Mr. Hardy's method tends to support the orderly, nonarbitrary method adopted by both the LPC, see, e.g., R 3394 (official transcript of November 4, 1987 Executive Session), and the Board of Estimate.

The December 1985 Hearings, Which Were Transcribed Verbatim in the Administrative Record, Provided The Owners With An Additional Opportunity To Be Heard.

20. On December 10, 1985 a duly advertised additional LPC public hearing was held to discuss the issue of the special guidelines developed by the LPC in its efforts to be responsive to concerns regarding any potential interference in the smooth production of legitimate plays in theatres which might ultimately be designated Landmarks. It was in the discussions leading up to the development of these guidelines, for instance, that backstage areas were excluded from review by the Commission and that an unprecedented series of beneficial and expedited review procedures freeing temporary production-related and many semipermanent state-of-the-art technological installations from Commission approval were crafted. An official transcript of this hearing is included in the record at 2917-3008. Of the petitioners, Gerald Schoenfeld testified at length about a broad range of issues, R 2924-2935, as did Robert Nederlander and Richard Wolff. All expressed their concerns about the guidelines while all other speakers were substantially in favor.

21. Gerald Schoenfeld himself lauded the Commission's openness, specifically regarding the controversial guidelines

governing designated theatre interiors. During his December 10, 1985 testimony regarding the proposed guidelines, Mr. Schoenfeld, who heads the powerful petitioner Shubert Organization, expressly thanked the LPC for its time, stating for the record:

> Commissioner Norman, members of the Commission, initially I would like to -- I would really like to express my appreciation to the Commissioner and the staff for the time that they have spent with us in developing these guidelines. I think that the time has been productively spent. R 2924.

This statement reflects accurately the open, thorough attention paid by the Commission to the owners' views throughout the administrative process.

During 1985-1988 the Owners and the City Engaged in an Ongoing Dialogue That Included Petitioners' Participation In the Commission's Executive Sessions.

22. Both the petitioners and the proponents of designation engaged in an extensive ongoing dialogue with the Commission on all pertinent issues throughout the LPC's exhaustive review of the eligibility of each theatre.

23. For example, Mr. Hardy and I issued a 25-page report in March 1987 proposing revisions in the method by which designation reports were drafted. The purpose of the report was educational; it explicitly was not a document favoring or disfavoring designation of any particular theatre. After extensive interchange, the Commission decided not to accept our recommendations. The LPC's decision does not obscure, however, the fact that for nearly a year the

Commission participated in an open exchange of views on this matter. I myself attended meetings with the Commission on this subject on May 22, June 4, July 30, October 15 and October 29 of 1987. On this issue the owners and I were in substantive accord, and while I disagreed with its ultimate decision I respected the openness and thoroughness of the Commission's review, which was characteristic of the fair process it provided throughout the lengthy administrative proceedings.

24. The record also reveals that the owners corresponded frequently with the Commission, expressing their views on a range of procedural and substantive matters, R 2476 (Mr. Schoenfeld to Chairman Norman, dated September 12, 1985), 2478 (owners' representative Ethan Geto to Chairman Norman, dated August 12, 1985), 2493 (Mr. Geto to Chairman Norman, dated December 17, 1986).

25. Following all public hearings and the continuing dialogue described above, the Commission began an exhaustive series of 29 Executive Sessions to consider the proposed theatre designations. The transcripts and minutes of these Executive Sessions, as well as the meetings and written communications between the LPC and the owners during this period of time, reflect the cognizance of the Commissioners of the full range of opinions expressed at all public hearings and show not only the serious consideration given to each individual theatre as prescribed by law but also the Commission's specific concern for the petitioners' views.

26. The record reveals a painstaking, fair administrative process, during which the theatre owners were accorded -- and pursued -- full access to government decisionmakers. In this regard, the record reflects, for example, that the owners or their representatives attended critical Executive Sessions of the Commission, R 2481 (letter from LPC Chairman Gene Norman to Mr. Geto, dated

August 27, 1985), and met on other occasions with LPC Commissioners and staff, R 2468 (letter from LPC Chairman Norman to Mr. Schoenfeld, dated August 19, 1984) and 2473 (letter from Mr. Schoenfeld to Chairman Norman, dated August 1, 1985, expressing appreciation for a meeting with Mr. Norman and his staff regarding the proposed theatre designations).

27. Finally, the transcript of the Executive Sessions, particularly the intensive long sessions that occurred during the months proceeding the final vote in 1988, show that through staff presentations, slides and personal visits to theatres the Commissioners who made the decisions were fully informed of the diversity of views which had been expressed throughout the long review process. Both by dint of the written record, including that of the original hearings which clearly show that the viewpoint of the petitioners at the beginning of the process remained essentially unchanged, and by the benefit of personal and lengthy contact with the petitioners and their representatives, as well as those who supported designations, those Commissioners who voted in 1988 were fully aware and had concluded by their own careful analysis and judgement which of the theatres under consideration were worthy of designation and which were not.

Prior To Approving the Designations the Board of Estimate Heard Further Testimony From the Owners.

28. The Board of Estimate's final confirmation of the Commission's exhaustive study and recommendations was based on a comprehensive designation report prepared by the LPC for each proposed designated theatre, R at Volumes XXII-XXX, as well as an extensive public hearing on March 10, 1988 at which more than 50 people testified,

R 6167-6353. Although the overwhelming majority spoke in favor of the designations, the Board of Estimate was able to consider the views of those few speakers who chose to attend the hearing, including the owners, and speak out against the designations. The owners (as well as the Executive Director of the League of American Theatres and Producers, a petitioner in this proceeding) testified at length and in detail before the Board of Estimate, R 6171-6209. The Board of Estimate also closely questioned Chairman Norman about the designations and the operational guidelines after the public testimony had ended, and only after long hours of consideration voted to support both the Commission and the overwhelming wishes of the public to designate the theatres.

Summary

29. In sum, the owners' contention that the Commissioners who voted in 1988 were unaware of their viewpoint and that the absence of a full transcription of the original hearing constitutes a flaw in the process is refuted by the record. The Commission fully considered the owners' views. Moreover, at no time during their oral testimony did petitioners address the substance of the criteria which circumscribed the Commission's authority but rather expressed a near global objection to designation for reasons unrelated to the Landmarks Law. The essence of the owners' argument persists to this day in this litigation: designation will financially undermine the theatre business. The owners' unsubstantiated, self-serving claim that the purpose of the Landmarks Law should be subverted or diluted for their personal profit is as unacceptable now as it was in 1982. In point of fact, the owners' arguments failed at the Commission and at the Board of Estimate not because they were excluded from the record or withheld but because they lacked merit.

30. For the reasons set forth above, in our previous affidavits and in our memoranda of law, I urge the Court to reject the owners' claims and to uphold the designations that emerged from the City's fair, thorough, open administrative review.

/s/
Jack L. Goldstein

Sworn to before me this
5th day of April, 1989

/s/
Notary Public

Excerpt from Transcript of Proceedings Before
New York Supreme Court, New York County
April 6, 1989
(Appellate Joint Appendix at 212-13)

MR. ALTER: I understood your Honor's view that with respect to the limited process employed by the Landmarks Commission and the Board of Estimate that it is your Honor's view that it may not be evidenciary [sic] hearing exploring this deliberative process.

However, the issue we are talking about now and the issue which your Honor says she wanted amplification had to do with simply the question of the procedure for communicating the record from the Landmarks Commission to the Board of Estimate and for placing that matter before the Landmarks Commission. That as I understand it your Honor, is a factual issue which your Honor had rightfully felt had constitutional overtones in which your Honor wanted to resolve.

* * *

Accordingly, and I might say, your Honor, that it comes rather late after these many months for the City to come forward and say let's not have this amplification. Let us give you this expert submission. So your Honor, I really believe that we ought not to depart from what had I had thought had been the original proposal in Court.

Namely that on that single narrow issue there be presented to the Court evidence and the opportunity for petitioners to cross examine the proof and the witnesses on that single issue.

**Excerpt from Transcript of Proceedings Before**
**New York City Landmarks Preservation Commission**
**June 17, 1986**
**(Appellate Joint Appendix at 2397)**

From an architectural point of view the theaters are no great shakes, but we are not here to talk about them as architectural because if they were, I would have to maintain the same position: They are no great shakes.

We are here to -- we have to recognize that theaters are part of the history of New York and also that their physical quality makes them part of the history of New York.

Their physical quality that draws people to them, that causes people to act well in them and to be heard and to be responded to and to be either acclaimed or panned by the critics the next day.

This is all part of the culture. So where does one draw the line?